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No. 86-870

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PHILLIPS PETROLEUM COMPANY and
CINQUE BAMBINI PARTNERSHIP,
Petitioners,

v.

STATE OF MISSISSIPPI and
SAGA PETROLEUM, U.S., INC.,
Respondents.

On Writ of Certiorari to
the Supreme Court of Mississippi

BRIEF OF RESPONDENT, STATE OF MISSISSIPPI

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QUESTION PRESENTED

At the time Mississippi entered the Union in 1817, under the common law and on an equal footing with the original states, did the public trust lands conveyed by the United States to Mississippi include all tidelands within its boundaries.

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BRIEF OF RESPONDENT, STATE OF MISSISSIPPI

Respondent, State of Mississippi, respectfully prays that this Court, upon reviewing the records, facts and arguments of counsel, will affirm the judgment of the Supreme Court of Mississippi.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ORDINANCE OF 1787: THE NORTHWEST TERRITORIAL GOVERNMENT:

[The Confederate Congress, July 13, 1787]

"An Ordinance for the government of the territory of the United States northwest of the river Ohio:

> "Sec. 14. It is hereby ordained and declared by the authority aforesaid, that the following articles shall be considered as articles of compact, between the original States and the people and States in the said territory, and forever remain unalterable, unless by common consent, to-wit:
>
> "Art. II. The inhabitants of the said territory shall always be entitled to the benefits of the writs of *habeas corpus,* and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law . . . .
>
> * * * * *
>
> "Art. V. . . . such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States, in all respects whatever; and shall be at liberty to form a permanent constitution and State government: *Provided,* The constitution and government, so to be formed, shall be republican, and in conformity to the principles contained in these articles . . . ."

CONSTITUTION OF THE UNITED STATES, ARTICLE IV:

> "Section 3. New States may be admitted by the Congress into this Union; . . . ."

CONSTITUTION OF THE UNITED STATES, TENTH AMENDMENT:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ACT OF MARCH 1, 1817, 3 STAT. 348-349:

> "Section 1. . . . the inhabitants of the western part of the Mississippi territory . . . hereby are authorized to form for themselves a constitution and state government . . . and the said state, when formed, shall be admitted into the union upon the same footing with the original states, in all respects whatever.
>
> * * * * *
>
> "Sec. 4. *And be it further enacted,* . . . authorized to form a constitution and state government: *Provided,* that the same, when formed, shall be republican, and not repugnant to the principles of the ordinance of the thirteenth of July, one thousand seven hundred and eighty-seven, between the people and states of the territory north-west of the river Ohio, so far as the same has been extended to the said territory by the articles of agreement between the United States and the state of Georgia, or of the constitution of the United States: . . ."

CONGRESSIONAL RESOLUTION OF DECEMBER 10, 1817, 3 STAT. 472, 473:

> "Resolution of the admission of the State of Mississippi into the Union.
>
> "WHEREAS, in pursuant of an act of Congress, passed on the first day of March, one thousand eight hundred and seventeen, entitled 'An act to enable the people of the western part of the Mississippi territory to form a constitution and state government, and for the admission of such state into the union on an equal footing with the original states', the people of the said territory did,

on the fifteenth day of August, in the present year, by a convention called for that purpose, form for themselves a constitution and state government, which constitution and state government so formed, is republican, between the original states and the people and states in the territory north-west of the river Ohio, passed on the thirteenth day of July, one thousand seven hundred and eighty-seven –

Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled, that the state of Mississippi shall be one, and is hereby declared to be one, of the United States of America, and admitted into the union on an equal footing with the original states, in all respects whatever.

APPROVED, December 10, 1817."

SUBMERGED LANDS ACT, 43 U.S.C. Sec. 1301 *et seq.* (1953)

"Sec. 1301. Definitions.

"When used in this subchapter and subchapter II of this chapter –

"(a) The term 'lands beneath navigable waters' means –

(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide . . . , and

(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

* * * * *

"Sec. 1311. Rights of the States

"(a) Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use

It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective states in which the land is located, and the respective grantees, lessors, or successors in interest thereof.

"(b) Release and relinquishment of title and claims of the United States. . . .

(1) The United States releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to

all said lands, improvements, and natural resources; . . ."

STATEMENT OF THE CASE

The dispute of the lower court was in the nature of a land title question; the Mississippi Supreme Court held that certain tidelands[1] in controversy belonged to the State as part of the lands conveyed to it in trust at statehood by virtue of the equal footing doctrine.

The lawsuit arose as a result of action taken by the Mineral Lease Commission of the State of Mississippi to lease lands subject to the ebb and flow of the tide in Hancock County, involving some 600 acres, more or less. The lease clearly specified that the lands subject to lease were below the water mark of mean high tide (Pet. App. 54).[2]

The Petitioners, Cinque Bambini Partnership and other landowners filed suit in Hancock County Chancery Court to confirm title on 2,400 acres, including the land subject to state lease and asserted that state-owned tidelands were lands which they claimed they owned by virtue of federal patents issued to their predecessors in title under Congressional Acts of 1822 and 1830.

The entire 2,400 acres was never claimed by the State to be in the State's public trust domain. Part of the 600 acres leased are not in dispute as trustlands. The remaining 141

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[1] "Tideland" is land between the lines of the ordinary high and low tides, covered and uncovered successively by the ebb and flow thereof; and covered and uncovered by the ordinary tides; land over which the tide ebbs and flows. Black's Law Dictionary, 1652 (4th ed. 1969).

[2] In this brief, "Pet. App." references are to the appendix to the petition for writ of certiorari. "Res. App." references are to the appendix to the brief in opposition to the petition for writ of certiorari.

acres, in dispute, were found by the trial court to be in the public trust lands of Mississippi. The acreage was composed of 42 acres of the North branch of Bayou LaCroix and 11 small unnamed streams and inlets, a larger undetermined acreage under the original Bayou Enciente and Long Gar Bayous, and a connecting channel to the Jourdan River. Much of the land in question is submerged lands, always under water, and the rest is tideland. Adjacent uplands from these two bayous dredged out at the direction of the Cinque Bambini Partnership were for two deep lakes for their own personal use. (Pet. App. 47a, 52a to 57a). This dredging resulted in the destruction of the original mean high tide line on these two bayous, the filling in of the entrance and channel of Bayou Enceinte, and the creation of a new artificial channel.

The Hancock County Chancery Court ruled that the State of Mississippi owned these lands which were subject to tidal influence pursuant to the public trust doctrine, and included the two dredged out lakes. The Mississippi Supreme Court affirmed this ruling except as to the man-made lakes holding the lakes to be in private ownership except for the original beds of the bayou.

The argument advanced by the Petitioners is that the claims of their predecessors in title predated statehood and thus the lands were not delivered pursuant to the public trust but were the subject of Spanish grants. The argument fails because there was no treaty involved between the United States and Spain involving possible Spanish land grants; consequently, the settlers in the region only held claims not grants. Their claims, listed in the *American State Papers, Public Lands,* (Duff Green Edition), Vol. 3 (Res. App. 1a-5a) and Vol. 5 (Res. App. 6a-8a) show that of four claims involved in the case before this Court, three had "no claims derived from either the French, British or

Spanish Governments." Nevertheless, in 1822 each received a donation under § 3 of the Act of May 8, 1822, 3 Stat. 707.

The fourth claim originally appeared not to be entitled to confirmation; however, in § 1 of the Act of May 28, 1830, 4 Stat. 408, after additional testimony, this claim was reviewed and it was confirmed for a reasonable quantity. These confirmed claims were donations of public land by the United States Government based on actual settlement in the area prior to April 15, 1813.

The Petitioners would seek to confuse this Court and cloud the issue presented before this Court by attempting to mask the true question saying their title falls under an exception granted by the United States; however, the facts show these patents were merely in the nature of quitclaim deeds and did not convey any tidelands.

In the case of *Choctaw Nation v. Oklahoma,* 397 U.S. 620 (1970), this Court held that the United States may convey property to a private party prior to statehood. The case dealt specifically with a singular exception, i.e., a treaty. There was no treaty protecting these claims of settlers. These four federal patents dated post-Mississippi statehood, conveyed only what the Federal Government could quitclaim away, and under no stretch of the imagination could this include tidelands since Mississippi acquired title to this property earlier at statehood.

Petitioners' first brush with the assertion of dominion by the State of Mississippi over the state-owned tidally influenced lands adjacent to Petitioner Bambini's property was felt by Petitioner specifically on his property at the point when the State found a leaseholder for its interests in Saga Petroleum. However, the public trust doctrine is clear in Mississippi's view by the many decisions having

been rendered by the Supreme Court of Mississippi involving tidal waters not navigable in fact. For a partial listing of these cases, see Pet. App. 13a and 14a.

Contrary to Petitioners' claim, the question presented before this Court does not present an unusual federal question since this Court has settled ownership of tidelands in the new states. The Court has recognized English common law to govern in these cases. *Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212 (1845). There was never any requirement by this Court that tidelands must be navigable in fact, as Petitioners suggest, in order to be public trust lands.

The fragmentary quotation (Pet. Brief, pg. 4) from Lord Hale's 17th century manuscript, *De Jure Maris,* has no relevance to the question at issue. Lord Hale referred to the English common law rule that *above the tide* "little streams and rivers that are not a common passage for the King's people" were private both as to ownership and use. M. Hale, *De Jure Maris* (reprinted in S. Moore, History of the Foreshore 374 (1888)).

The Mississippi Mineral Lease Commission never used the maps prepared by the Marine Resources Council to delineate legal boundaries of state-owned tidelands but merely as the best available indication of the state land in question. Exact boundaries could only be determined by surveys and a decision of the Chancery Court. Contrary to Petitioners' claim, the tidelands at issue have never been "privately held" but were vested in the State in 1817.

Petitioners make many attempts to misrepresent the true nature of the tidelands at issue in this case. For instance, "wetlands" is a general term denoting a marshy or swamp area inland and, if the term is used in connection with tidelands, it should be expressed as "coastal wet-

lands." These tidelands are all below sea level and are daily affected by the action of the tide from the Gulf of Mexico. They consist of submerged lands, rivers, bayous and creeks, and all arms of the sea. The level of the water in these lands is controlled entirely from the sea and not from water draining from inland areas above the tide. In no sense of the word could they be described as "drainage ditches."

SUMMARY OF ARGUMENT

Mississippi's arguments are based on this Court's decisions interpreting the common law as it was understood in this country at the close of the Revolution.

Mississippi's position may be summarized as follows:

1. In England under the common law all tidal waters were considered navigable and were held by the Crown in trust for all the people. This country adopted the English common law at the time of its Constitution in 1787.

2. Upon the Revolution the thirteen colonies became sovereign independent states and succeeded to all the sovereign rights and powers of the Crown in the tidelands and tidewaters within their respective borders.

3. By the Tenth Amendment to the Constitution, the original states reserved all powers not specifically granted to the United States. Among the powers retained were their sovereign rights over all their tidelands.

4. Mississippi was admitted into the Union on December 10, 1817, under definite provisions of the Ordinance of 1787 and the Georgia Cession Agreement of April 24, 1802, which required that Mississippi adopt the

common law. The Act of Admission stated that, having met all the requirements of the Ordinance of 1787, Mississippi was admitted into the Union "on an equal footing with the original states in all respects whatever." Thus Mississippi acquired as a sovereign coastal state all the same *rights* to all its tidelands as Georgia and the other original states possessed after the Revolution.

5. The "navigability in fact" test has never been used to determine ownership of tidelands by the states.

6. The Submerged Lands Act of 1953, 43 U.S.C.A. Section 1301, *et seq.*, codified the decisions of this Court regarding tidelands and confirmed the rights of the states in all tidelands within their respective borders.

ARGUMENT

I.

The Public Trust Doctrine Relating to Tidelands is Predicated on the Ebb and Flow Test

The common law of England is the basis for the public trust doctrine in this country; the "ebb and flow" test was the only test used for determining the extent of the Crown's ownership of the lands held under the public trust which defined the boundary between public and private ownership as the ordinary high water mark of the tide.

The common law "ebb and flow" test of royal ownership was the only reasonable method to define the boundary between public and private ownership in the waters of England. Considering the times, it was the only easily understood standard of measurement. As this Court said in *The Propeller Genesee Chief v. Fitzhugh,* 53 U.S. (12 How.) 443, 454 (1851), "they took the ebb and flow of the

tide as the test [of waters owned by the King] because it was a convenient one."

The word "navigable" is said to be derived from the rights of free navigation of the sea and the right of access to any part of the shore from the sea, common to all the King's subjects. The English court, in *The Case of the Royal Fisheries of the Banne,* Davies' Rep. 149 (circa 1604), reasoned that the King owned every navigable (tidal) river "because such river participates of the nature of the sea, and is said to be a branch of the sea so far as it goes . . . ." Whenever the term "navigable" is used in the common law, it has a technical meaning "wherever the tide ebbs and flows," and has no reference to capacity for navigation. "Navigable water" and "tidewater" were synonymous terms used interchangeably.[3] There was never any

[3] *Navigable:* ". . . the term is often, particularly at common law, understood in a more restricted sense, viz., subject to the ebb and flow of the tide." Black's Law Dictionary 1178 (4th ed. 1969).

"Navigable River or Stream: "At common law, a river or stream in which the tide ebbs and flows, or as far as the tide ebbs and flows. 3 Kent, Comm 412, 414, 417, 418 . . . ." *Id.* at 1179.

"On the other hand it was held, that in rivers not navigable [and in the common law sense of the term, *those only were deemed navigable in which the tide ebbed and flowed]* the owners of the soil on each side had the interest, and the right of fishery; and it was an exclusive right, and extended to the centre of the stream opposite their respective lands." Commentaries on American Law by James Kent, Vo. III, p. 412 (1889).

The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 454, 455 (1851): "In England, therefore, tidewater and navigable water are synonymous terms, and tide-water . . . meant nothing more than public rivers, as contra-distinguished from private ones; and they took the ebb and flow of the tide as the test, because it was a convenient one, and more easily determined the character of the river. Hence, the established doctrine in England, that the admiralty jurisdiction is confined to the ebb and flow of the tide . . . And, indeed, until the discovery of steamboats, there could be nothing like foreign com-

mention of navigability in fact as a factor in determining public ownership under the common law.

The rules and principles laid down by Lord Chief Justice Hale, as found in his 17th century treatise, M. Hale, *De Jure Maris* (reprinted in S. Moore, History of the Foreshore (3rd ed. 1888)), are acknowledged by this Court in *Martin v. Lessee of Waddell,* 41 U.S. (16 Pet.) 367 (1842) and *Shively v. Bowlby,* 152 U.S. 1 (1849), as containing the correct common law doctrine as to the rights and power of the King over the navigable (i.e., tidal) waters of England.

> "In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea, below ordinary high water mark, is in the King . . . and that this title . . . is held subject to the public right of navigation and fishing." 152 U.S. at 13.

According to Lord Hale, the King owned in trust for the people all waters subject to the ebb and flow of the tide, and the soils beneath them, to the ordinary highwater mark.[4] This included the "sea and soil thereof," the "shore," and 'an arm or creek of the sea." Moore at 376, 377, 378. Lord Hale declared:

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merce upon waters with an unchanging current resisting the upward passage. The courts of the United States, therefore, naturally adopted the English mode of defining a public river, and consequently the boundary of admiralty jurisdiction. It measured it by tide-water . . . ."

[4] See Maloney and Ausness, *The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping,* 53 N.C. L. Rev. 185, 200 (1975), citing English cases which "firmly established" the Hale doctrine by the end of the 17th century, that the foreshore and the soil beneath arms and creeks of the sea as far as the ebb and flow of the tide belonged to the King.

> "The shore is that ground that is between the ordinary high-water and low-water mark. This doth prima facie and of common right belong to the king, both in the shore of the sea and the shore of the arms of the sea." Moore at 377.
>
> "Ford the second, that is called an arm of the sea where the sea flows and reflows, and so far only as the sea so flows and reflows; . . . ." *Id.*

Also, according to Lord Hale, all rivers above the tide and the soils beneath belonged to the adjacent owners to the center of the stream. Moore at 370. All rivers, both fresh and salt, "that are of common or public use for carriage of boats and lighters" were "common highways for man or goods or both from one inland town to another." *Id.* at 374. Small nontidal streams, if unsuitable for common highways, were private both in use and ownership. *Id.*

The meaning of the common law as it related to the sovereign rights of the original states in their tidewaters is that enunciated in *Arnold v. Mundy,* 6 N.J.L. 1 (N.J.S. Ct. 1821). The New Jersey Supreme Court asserted the sovereign ownership of the State in the tidal waters of New Jersey to the same extent as the King of England had held them before the Revolution. After reviewing Lord Hale's treatise that all waters subject to the ebb and flow of the tide belonged to the King as a common law right and the *Case of the Royal Fisheries of the Banne River* in Ireland, which held the same, the court ruled that previous grants made to lands under tidewaters had no validity because neither the king nor any of his agents had the power to grant proprietary rights in these waters.

The same common law concept of ebb and flow was confirmed in *Martin v. Waddell.* The *Shively* Court, 152 U.S. at 15, referred to it as "the leading case in this court,

as to the title and dominion of *tide waters* and of the lands under them." (Emphasis added) This Court recognized that the public trust doctrine applied in this country as well as in England, by affirming New Jersey's sovereign ownership of tidelands in trust for the people as against prior commitments by the King or his agents. The Court placed "great weight" on *Arnold v. Mundy's* common law precedents and accepted Lord Hale's doctrine of royal ownership. The Court went on to say that, although there had been some question in England whether the King could grant exclusive rights in tidal waters, it regarded the matter settled that since the Magna Carta, the King could not validly make private grants in tidal waters; and that, furthermore, it was of no consequence in this country:

> "For when the Revolution took place the people of each State became themselves sovereign; and in that character hold the *absolute right* to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the constitution to the general government." 152 U.S. at 15.

Thus, this Court established that each state's right to own its tidelands became a part of the common law of this country. The thirteen original states as new sovereigns succeeded to all the prerogative rights of the King[5] and Parliament in tidal waters within their respective jurisdictions. This included "the great right of dominion and ownership in the rivers, bays, and arms of the sea, and the soils under them," which were part of the sovereignty of the Crown. *Martin v. Waddell,* at 416. By injecting navigability in fact

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[5] "At the time of the adoption of the Constitution, American statesmen were conversant with the laws of England and familiar with the prerogatives exercised by the Crown." *Ex Parte Grossman,* 267 U.S. 87, 110 (1924).

as a test of royal ownership, Petitioners misunderstand the accepted meaning of the common law in this country at the time of the Revolution, which is the governing law concerning the rights of the thirteen original states in their tidewater.

> "The common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country . . . ." *Shively v. Bowlby*, 152 U.S. 1, 14.

All tidal waters were deemed to be "navigable," and all waters above the tide were known as "non-navigable."[6] The extent of ownership of tidelands and tidewaters by the original states must be determined by reference to the common law of England since this was our country's recognized law in 1787.

The case of the *Mayor of Colchester v. Brooke*, Q.B. 339, 115 Eng. Rep. 518 (1845) cited by Petitioners was not unlike other cases cited by them, and dealt with a tidally influenced waterway, which at low tide wasn't "navigable in fact" in the sense that vessels did not have sufficient draft to navigate, and as such the vessels were susceptible to grounding on oyster beds. Chief Justice Lord Denman stated at page 374, "The right of soil in arms of the sea and public navigable rivers, *which the Crown prima facie has independently of any ownership in the adjoining lands*, must in all cases be considered as subject to the public

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[6] In an early New York case, *Palmer v. Mulligan*, 3 Caines 307 (N.Y. S.Ct. 1805), 2 Am. Dec. 270, Chancellor Kent recognized the common law rule that only tidal waters were navigable, saying that "the Hudson at Stillwater is a fresh water river, *not navigable in the common-law sense of the term, because the tide does not ebb and flow at that place.* In the *Royal Fishery of the Banne*, it was resolved that by the rules and authorities of the common-law every river where the sea does not ebb and flow is an inland river, not navigable, and belonged to the owners of the adjoining soil." (Emphasis added)

right or passage . . . ." (Emphasis added). This case only tends to reiterate Respondents' argument, which is that each state acquired under the equal footing doctrine the rights ascribed to it by English common law, and therefore the State of Mississippi owns all lands subject to tidal influence.

As further authority for Petitioner's erroneous view of the English common law, they quote, out of context, from Chapter III of Lord Hale's treatise *De Jure Maris*. (Pages 20 and 21 of Petitioners' brief). They fail to note that Chapters I and II of the treatise were limited to discussion of freshwater rivers in which it was stated that all rivers above the tide, regardless of size, were privately owned. Chapter III dealt entirely with use of rivers both above and below the tide, and the quoted passage, referring to rivers above the tide, stated that little rivers too small to be used as a common passage were private both in ownership and in use. Larger rivers, both above and below the tide, were subject to public use as common highways. The ownership of waters below the tide was not discussed until Chapter IV, in which Lord Hale stated that the King owned the seabed and the shores of the sea, the arms of the sea, the rivers and creeks up to the point of ordinary high tide, for the benefit of the people.

The illogical conclusion arrived upon by Petitioners is a distinct distortion of Lord Hale's doctrine. Lord Hale made a definite distinction between ownership in tidal and nontidal waters on the sole basis of ebb and flow of the tide, which set the dividing line between private ownership of waters above the tide and ownership by the King below the tide. Under the common law the use of a river as a common highway had no bearing on its ownership.

Petitioners also imply that English case law has consistently followed their interpretation of Lord Hale's rules,

citing *The Case of the Royal Fisheries of the Banne,* Davies' Rep. 149 (1604). At issue was the validity of a grant from the King of a fishery in the Banne River at a point where the river was tidal. On pages 21 and 22 of their brief, Petitioners quote from the court's opinion in the language of the time under which every river was deemed navigable up to the point of high tide and, as a branch of the sea, was owned by the King; and every other river was in private ownership. This statement was in complete accord with Lord Hale's doctrine. However, Petitioners imply that the word "navigable" in this passage meant "navigable in fact" and that the case clearly distinguished between navigable in fact and non-navigable in fact rivers, ascribed royal ownership to the former and private riparian ownership to the latter. This is contrary to the common law. As the court plainly stated, the King's ownership extended only to the point of high tide and *not* as far as the river was actually navigable. It is enough to say that any views that might have been expressed by English courts, or by commentary cited by Petitioners, are immaterial to the present controversy.

Upon the adoption of the Constitution in 1787, the thirteen original states reserved the rights to all tidelands within their respective borders, without limitation of any kind, under the Tenth Amendment[7] to the Constitution, as acknowledged by this Court in *Pollard.* 44 U.S. at 230.

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[7] The Tenth Amendment to the Constitution, adopted by Congress September 25, 1789, provided: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the United States, are reserved to the States respectively, or to the people."

"In order that there should be no uncertainty in respect of what was taken and what was left, the national powers of legislation were not aggregated but enumerated – with the result that what was not embraced by the enumeration remained vested in the states without change or impairment." *Carter v. Carter Coal Co.*, 298 U.S. 294 (1935).

There is no similarity between the present case and *Montana v. United States,* 450 U.S. 544 (1981), in which this Court held that title to the bed of the *nontidal* Big Horn River passed to Montana upon its admission into the Union under the federal navigability in fact test for state ownership of waters above the tide. Thus, the *Montana* case has nothing in common with Mississippi's ownership of its tidelands under the common law public trust doctrine recognized in 1817. In fact, Petitioners admit that such test "was first brought into the public trust arena for *nontidal* rivers" in *Packer v. Bird,* 137 U.S. 661 (1891).

The most recent case involving the equal footing doctrine decided by this Court is that of *Utah Division of State Lands v. U.S.*, No. 85-1772, slip opinion (U.S. Supreme Court, decided June 8, 1987), involving oil and gas leases for land under Utah Lake wherein the federal government asserted it had reserved the lake bed prior to Utah's statehood for use as a reservoir. The state plead that title passed to the State by the "equal footing doctrine." This Court stated at page 1:

> "The equal footing doctrine is deeply rooted in history, and the proper application of the doctrine requires an understanding of its origins. Under English common law the English crown held sovereign title to all lands underlying navigable waters . . . . Because all subsequently admitted states enter the Union on an 'equal footing' with the original thirteen states, they too hold title to the land under navigable waters within their boundaries upon entry into the Union. *Pollard's Lessee v. Hagan,* 3 How. 212 (1845)."

This Court further went on to hold that examination of the title to beds of navigable waters begins with a strong

presumption against conveyance by the United States and unless clearly defined, would not convey land under waters of a stream. This Court found that Utah was correct in acquiring the lands under equal footing and thereby reversed the lower court's decision.

II.

Rights of the Original States in the Tidelands

Since *Martin v. Waddell* held that no grants made by the King or his agents in this country were valid, the absolute rights to *all* the lands subject to the ebb and flow of the tide up to the high water mark passed automatically from the Crown to the original states as new sovereigns at the end of the Revolution. No claims needed to be made to tideland as it was an attribute of sovereignty.

Thus, the rights that each of the original states such as New Jersey acquired to all tidelands within its borders is precisely the same right which was vested in Mississippi in 1817 under the equal footing rule. There can be no distinction between those states which acquired their independence by force of arms and those which acquired it by the peaceful consent of the older states.

Yet each of the original states as absolute sovereigns could deal with its tidelands according to its own views, reserving its own control over them or granting rights therein to individuals or corporations. Some states modified the common law and added navigable in fact waters above the tide to their public trust lands, as in Pennsylvania and New York and other states granted rights in the tidelands to individuals, as in Connecticut and Massachusetts. As the *Shively* Court stated, once they received the tidelands it was their right to dispose of them as they wished:

> "The . . . summary of the laws of the original states shows that there is no universal and uniform law upon the subject; but that each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over them, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Greater caution, therefore, is necessary in applying precedents in one state to cases arising in another." 152 U.S. at 26.

Georgia adopted the common law in 1778 [Act of November 15, 1778, Watkins & Watkins, *Digest of the Laws of the State of Georgia,* 231-32 (1800)], under which title and ownership of the foreshore was in the State, and has never conveyed fee simple title to any of its tidelands. *State v. Ashmore,* 224 S.E.2d 334, 236 Ga. 401, *cert. den.*, 429 U.S. 830, 97 S.Ct. 90, 50 L.Ed.2d 93 (1976).

III.

The Equal Footing Doctrine

In 1787 before the Constitution was written, the Confederate Congress adopted an ordinance commonly known as the "Ordinance of 1787: The Northwest Territorial Government," which set up guidelines for the government of the northwest territory and for the admission of new states to be formed from it. It described principles and rights of the people in the territories, required that courts be set up with common law jurisdiction, and that the territorial government adopt such laws of the original states as might be necessary. It also provided for the establishment of states and their admission "to a share

in the Federal councils on an equal footing with the original States . . . ." Section 13.

Section 14 provided:

> "It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact, between the original States and the people and States in the said Territory, and forever remain unalterable, unless by common consent, . . ."

These articles mandated that the people should always be entitled to "judicial proceedings according to the course of the common law." Art. II; that "the "navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free . . . ." Art. IV: and also mandated:

> ". . . such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States, in all respects whatever; and shall be at liberty to form a permanent constitution and State government: *Provided,* the constitution and government so to be formed, shall be republican, and in conformity to the principles contained in these articles . . . ." Art. V.

The Ordinance was the forerunner of the Constitution adopted on December 17, 1787 and is regarded as part of the organic or fundamental law of this country. Many of the principles adopted in the Constitution and Bill of Rights were first outlined in this Ordinance.

Georgia, under a Cession Agreement dated April 24, 1802, ceded the land from which Congress on April 17, 1798 had established as the Mississippi Territory. This agreement incorporated the provisions of the Ordinance of 1787.

The Enabling Act of March 1, 1817 authorized the inhabitants of the western part of the Mississippi Territory to form a state "to be admitted into the Union upon the same footing with the original states, in all respects whatever."

The Resolution for the admission of Mississippi into the Union dated December 10, 1817, acknowledged that Mississippi had complied with all the principles of the compact between the original states in the Ordinance of 1787 and that the State was admitted into the Union "on an equal footing with the original states, in all respects whatever."

Thus, the Congressional Act admitting Mississippi into the Union acknowledged the common law to be the same as was recognized in the thirteen original states. Mississippi, as the first new coastal state admitted under the terms of the Ordinance of 1787, received the same common law *rights* to all tidelands, under the public trust, within its boundaries and, following a strict interpretation of the common law, gave up all rights to waters above the tide to the Federal Government for disposal to private individuals, with the proviso that the Mississippi River be kept as a public highway.

While all the new states had some form of equal footing clause in their Acts of Admission, in some the actual terminology was different, *e.g.*, Kentucky, admitted on February 14, 1791, "as a new and entire member of the United States of America"; Louisiana,[8] admitted in 1812, "on an equal footing with the original states, and for other pur-

[8] Louisiana was the first new coastal state admitted on April 8, 1812. Its Enabling Act dated February 20, 1811, did not contain any requirement that the *common law be adopted* but only that its constitution "shall be republican, and consistent with the constitution of the United States; . . . ." Section 3 (Emphasis added).

poses," with no requirement that it accept the common law.

The equal footing doctrine as established by the Ordinance of 1787 and the Acts of Congress under which new states were admitted into the Union guaranteed to them the same rights and privileges as the original states enjoyed as sovereign states. The original states which were coastal were entitled to own all the tidelands within their respective boundaries as trust lands.

Petitioners misconstrue the purpose of the equal footing doctrine. It calls for parity in political and sovereign rights[9] among the various states and does not require economic equality. It does nothing more, or less, than guarantee equal rights.[10]

It is also acknowledged that the original states reserved all their tidelands under the Tenth Amendment to the Constitution. *Pollard's Lessee v. Hagan*. Petitioners have not offered any proof that the original states did not

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[9] To say that for one state to receive more submerged lands than another would be unconstitutional under the equal footing doctrine is incorrect, as shown by this Court's reaction to the suit of *Alabama v. Texas* challenging the constitutionality of the Submerged Lands Act of 1953. The Court denied the motions for leave to file complaints, stating: ". . . Alabama and the defendant states were admitted into the Union 'upon the same footing with the original states, in all respects whatever,' . . . The requirement of equal footing does not demand that courts wipe out diversities 'in the economic aspects of the several States,' but calls for 'parity as respects political standing and sovereignty.' *United States v. Texas, supra,* at 716." *Alabama v. Texas,* 347 U.S. 272, 275 (1954).'

[10] And in *The Propeller Genesee Chief v. Fitzhugh,* 53 U.S. (12 How.) 443, 453, 454 (1851), this Court stated: "The Union is formed upon the basis of equal rights among all the states . . . ; that is, a perfect equality in the rights and the privileges of the citizens of the different states not only in the laws of the general government, but in the mode of administering them."

reserve all their tidelands or that they transferred to the United States any of these sovereign lands. The Virginia Cession Agreement of 1784 and the Georgia Cession Agreement of 1802 ceded to the United States only the "waste and unappropriated" lands in the interior to be sold for the public benefit and did not include tidelands.

In *Pollard's Lessee,* the validity of a federal patent to tidelands in Alabama was at issue, described as "mud flats" along the river in the City of Mobile which were covered by high tide in 1819 when Alabama entered the Union. This Court stated that this was the first time it had been called upon to "draw the line that separates the sovereignty and jurisdiction of the government of the Union, and the State governments, over the subject in controversy." 44 U.S. at 220.

The Court noted that the original states had reserved their rights to tidelands from the United States and ruled that the new states were entitled to the same rights to the tidelands within their respective jurisdictions as the original states possessed. In so holding, the Court established the absolute title of the states to their tidelands. *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.,* 429 U.S. 363, 374 (1977)

Since Mississippi had entered the Union upon the same conditions as Alabama, the *Pollard* decision meant that Mississippi was vested with absolute title to its tidelands and the patents granted to the Cinque Bambini predecessors can have no validity insofar as they purport to convey tidelands.

In *Weber v. State Harbor Comm'rs.,* 85 U.S. (18 Wall.) 57, (1873) at pages 65, 66, the Court affirmed that the United States held the title to the soil under the tideweaters of San Francisco Bay (acquired from Mexico) in trust for the future state:

> "Upon the admission of California into the Union upon equal footing with the original states, absolute property in, and dominion and sovereignty over, *all soils under the tidewaters* within her limits passed to the state, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper . . . subject only to the paramount right of navigation over the waters . . . ." (Emphasis added).

Shively v. Bowlby, 152 U.S. 1 (1894), affirmed a decision of the Oregon Supreme Court that a congressional donation claim granted while Oregon was still a territory passed no title or right in lands below high water mark, as against subsequent deeds from Oregon. The lands in question were tidelands along the Columbia River.

The Court noted that the jurisprudence of Oregon is based on the common law and affirmed the assertion by the Supreme Court of Oregon that "from all this it appears that when the State of Oregon was admitted into the Union, the tidelands became its property and subject to its jurisdiction and disposal . . . ." 152 U.S. at 56.

The case of *Mann v. Tacoma Land Co.,* 153 U.S. 273 (1894) speaks to the heart of the issue in the case at bar. The property at issue consisted of mud flats, bare at low water, but nevertheless overflowed at high water from two to four feet deep. The property was part of the lands acquired from a Mexican treaty between the United States and Mexico which did not confirm Mexican grants of land.

The lands in *Mann, Id.,* were tidelands which the Plaintiff did not claim by any grant from the State of Washington nor by any act of Congress specifically grant-

ing him the lands. This Court at page 822 states its position as follows:

> "That the title to tide lands is in the state is a proposition which has been again and again affirmed by this court, some of the earlier opinions going so far as to declare that the United States had no power to grant to individuals such lands at any time, even prior to the admission of the state and during the territorial existence."

Citing *Shively v. Bowlby* and other cases, the Court went on to say that this question has been asked and answered many times, and the lower court decree was affirmed.

Borax Consolidated Ltd. v. City of Los Angeles, 296 U.S. 10 (1935) was a suit by the City of Los Angeles to quiet title to land claimed to be tideland on Mormon Island situated in what is now known as Los Angeles Harbor. The City asserted title under a legislative grant by the State. *Borax* claimed under a United States patent. The Court held that the City was entitled to a new survey to determine whether any part of the land was, in fact, tideland. In the words of this Court:

> *"The controversy is limited by settled principles governing the title to tidelands.* The soils under tidewaters within the original States were reserved to them respectively, and the State since admitted to the Union have the same sovereignty and jurisdiction in relation to such lands as the original States possessed . . . This doctrine applied to tidelands in California." 296 U.S. at 15 (Emphasis added).
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> * * * * *
>
> "It follows that if the land in question was tideland, the title passed to California at the time

of her admission to the Union in 1850. That the Federal Government had no power to convey tidelands, which had thus vested in a State, was early determined." *Id.* at 16.

IV.

The Navigability in Fact Test Applicable to Non-tidal Waters Has Never Replaced the Ebb and Flow Test of Ownership of Tidal Waters by the States

The use of the term "navigable in fact" as an additional meaning of "navigable" did not appear in American jurisprudence until the invention of the steamboat. In 1851, this Court in *The Propeller Genesee Chief v. Fitzhugh,* 53 U.S. (12 How.) 443 (1851), amended the common law rule which limited the admiralty jurisdiction to tidal waters by extending such jurisdiction to waters above the tide which were commercially navigable. The word "navigable" was used in *Genesee Chief* to describe those waters above the tide that were capable of being passed over in ships or vessels for the purpose of admiralty jurisdiction. It had nothing to do with the common law use of "navigable" to describe those waters subject to the ebb and flow of the tide owned by the King. The Court emphasized that this decision related to jurisdiction only and stated that "the judgment we now give can disturb no rights of property . . . ." 53 U.S. at 459.

Petitioners state that "navigability in fact has become the *sine qua non* of the public trust doctrine." This is true only with reference to the federal public trust doctrine established by the courts after *Genesee Chief.* Following *Genesee Chief,* in 1870 in *The Daniel Ball,* 77 U.S. (10 Wall.) 557 (1870), this Court adopted a definition of

navigable in fact waters for extending admiralty jurisdiction to navigable in fact waters above tide. Since the admiralty courts already had complete jurisdiction of all tidewaters, there was no necessity for this definition to be retroactively applied to tidewaters.

Barney v. City of Keokuk, 94 U.S. 324 (1876), introduced into American jurisprudence the concept that navigable in fact waters above the tide should *also* belong to the states as a sovereign right. As this Court stated in *Corvallis,* p. 374, 375: "[*Barney*] *extended* the [*Pollard*] doctrine to waters which were nontidal but nonetheless navigble, consistent with its earlier extension of admiralty jurisdiction to such waters in *The Propeller Genesee Chief v. Fitzhugh,* 12 How. 443 (1852)." The Court "clearly articulated the rule that the States could formulate and modify, rules of riparian ownership as they saw fit." *Id.* at 379.

Thus, this Court expanded the common law public trust to include all navigable in fact freshwaters up to the point of high water mark. It should be noted that this test of public ownership was limited to waters above the tide. Petitioners have cited no decision of this Court which said that the "navigable in fact" test replaced the "ebb and flow" test for ownership of waters below the tide. The "navigable in fact" test has never been used in connection with tidewaters, either for ownership or admiralty.

Genesee Chief, Daniel Ball, and *Barney* laid the foundation for the new federal public trust doctrine under which the federal government held in trust for the future states the navigable in fact waters above the tide. While this Court in *Packer v. Bird,* 137 U.S. 661 (1891) and later cases concerning ownership of waters above the tide, adopted the *Daniel Ball* "navigability in fact" definition,

these cases have no bearing on this case because the lands involved herein are all below sea level and are controlled by the ebb and flow of the tide from the Gulf of Mexico.

McGilvra v. Ross, 215 U.S. 70 (1909), cited by Petitioners, concerned ownership of two navigable in fact lakes above the tide in the State of Washington. McGilvra claimed ownership under a federal patent granted while Washington was still a territory, and contended that ownership of the lakes must be determined by the common law rule because "when the patents were issued . . . 'the common law of England in relation to riparian ownership was in full force in the territory of Washington.'" The Court rejected this claim, saying that since *Genesee Chief* the common law rule as to private ownership of waters *above the tide* was no longer in effect.

Petitioners' interpretation of *McGilvra, Id.,* is entirely contrary to fact. The *McGilvra* Court referred to *Shively* and again reviewed all previous decisions regarding waters above the tide to show that the rule of ownership had been completely changed for such waters – and *only* for such waters – from private to public ownership. A close reading of *McGilvra* shows that the passage quoted by Petitioners – referred only to cases since *Genesee Chief* regarding ownership of waters above the tide.

This is the true meaning of the Court's reference to *Shively* in *McGilvra; Shively* was a tidewaters case, decided solely by the common law test of ebb and flow of the tide. The court reviewed all previous rulings concerning the ownership of tidelands as well as the meaning of "navigable waters," as including all tidelands under these decisions:

> "The new states admitted into the Union since the adoption of the Constitution have the same

> rights as the original states in the tidewaters, and in the lands below the high water mark, within their respective jurisdictions." 152 U.S. at 341.

With reference to the change in the common law doctrine as to ownership of waters above the tide, the *Shively* Court quoted from *Packer v. Bird,* 137 U.S. 669, 670:

> "As an incident of such ownership, the right of the riparian owner, where the waters are above the influence of the tide, will be limited according to the law of the state, either to low or high water mark, or will extend to the middle of the stream." 152 U.S. at 44.

By using an erroneous interpretation of *McGilvra* and misunderstanding the legal meaning of the words "shore lands"[11] and "riparian,"[12] Petitioners conclude arbitrarily that the test of state ownership of tidelands is now navigability in fact. This is one more instance where Petitioners attempt to apply retroactively this Court's rulings regarding waters above the tide to waters below the tide. Neither *Shively* nor *McGilvra* support the validity of their conclusions.

Petitioners assert that "the ebb and flow" test never did have any place in determining state ownership of public

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[11] *Shore Lands:* "Those lands lying between the lines of high and low water mark. Lands bordering on the shores of navigable lakes and rivers below the line of ordinary highwater." Black's Law Dictionary 1548 (4th Ed. 1969).

Shore: "Strictly and technically, lands adjacent to the sea or other tidal water." *Id.*

[12] *Riparian:* "Belonging or relating to the bank of a river; of or on the bank." *Id.* at 1490. "The term 'riparian' is applied to fresh water stream." H. Farnham, *The Law of Waters and Water Rights,* Section 63 (1904).

trust lands (p. 34 of Petitioners' brief), thus repudiating the unbroken line of decisions of this Court holding to the contrary. The right of Mississippi to all its tidelands, without limitation of any kind, rests on the common law, the public trust doctrine and the equal footing rule as interpreted by this Court.

Borax Consolidated Ltd. v. City of Los Angeles, 296 U.S. 10 (1935), decided by this Court twenty-six years after *McGilvra,* completely refutes Petitioners' argument that the test of state ownership of tidelands is "navigability in fact." *Borax* was decided solely on the basis of the common law "ebb and flow" test and this Court stated unequivocably that "if the land in question was tideland, the title passed to California at the time of her admission to the Union in 1850." 296 U.S. at 16.

As recently as 1984 this Court reaffirmed *Borax* in *Summa Corp. ex rel State Lands Commission,* 466 U.S. 198, 205 (1984):

> "The federal government, of course, cannot dispose of a right possessed by the State under the equal footing doctrine of the United States Constitution. *Pollard's Lessee v. Hagan,* 3 How. 212 (1845). Thus, an ordinary federal patent purporting to convey tidelands located within a state to a private individual is invalid, since the United States hold such tidelands only in trust for the state. *Borax Co. v. Los Angeles,* 296 U.S. 10, 15-16 (1935)

These decisions leave no doubt that the ebb and flow of the tide is still the test of state ownership of tidelands.

V.

The Submerged Lands Act

On May 22, 1953, Congress enacted the Submerged Lands Act, 43 U.S.C.A., 1301, *et seq.*, the expressed purpose of which was "to confirm and establish the titles of the States to lands beneath navigable waters within State boundaries." Congress codified the common law of this country as expressed in the decisions of this Court regarding ownership by the states of public trust waters.

Section 1311(a) sets forth the basic policy with respect to "lands beneath navigable waters within state boundaries, as follows:

> "It is determined and declared to be in the public interest that (1) *title to and ownership of the lands beneath navigable waters within the boundaries of the respective States,* and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law *be, and they are, subject to the provisions hereof, recognized, established, and vested in and assigned to the respective States* or the persons who were on June 5, 1950, entitled thereto under the law of the respective grantees, lessees, or successors in interest thereof; . . . ." (Emphasis added).

This section shows that "lands beneath navigable waters" were not being granted to the states as of 1953 but that Congress recognized and confirmed the pre-existing rights of the states in both tidal and nontidal waters.[13]

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[13] *See, Oregon ex rel State Land Board v. Corvallis Sand & Gravel Company,* 429 U.S. 363 (1977), footnote 4 at 371, in which Chief Justice Rehnquist commented:

In Section 1311(b) the United States released and relinquished to the state all right, title and interest which the United States had, if any, to these lands.

Section 1301(a) identifies three different categories of lands included within the definition of "lands beneath navigable waters." Only category (2)[14] is pertinent to the present case.

> "(a) The term 'lands beneath navigable waters' means –
>
> "(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters *that were navigable under the laws of the United States* at the time such State became a Member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;
>
> "(2) *all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide* . . . and
>
> "(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable

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". . . the Submerged Lands Act did not alter the scope or effect of the equal-footing doctrine. . . . The effect of the Act was merely to confirm the States' title to the beds of navigable waters within their boundaries as against any claim of the United States Government."

[14] *Tide-water:* "Water which falls and rises with the ebb and flow of the tide. The term is not usually applied to the open sea, but to coves, bays, rivers, etc." Black's Law Dictionary, 1652 (4th Ed. 1969).

Tideland: "Land between the lines of the ordinary high and low tides covered and uncovered successively by the ebb and flow thereof; land over which the tide ebbs and flows. *Id.*

waters, as hereinabove defined; . . . ." (Emphasis added).

Subsection (2) refers to all lands permanently or periodically covered by tidal waters as determined by the "ebb and flow" test. Under the common law at the time of the Revolution the only waters considered to be "navigable" were tidewaters and the only lands in the public trust in the original states were tidelands.

The language of the Act is clear and shows no attempt by Congress to replace the "ebb and flow" test with the "navigability in fact" test in tidelands. Thus, the Act is in complete agreement with all the decisions of this Court.

VI.

Reversing Mississippi's Title to the Tidelands in Controversy Which It Received Under the Equal Footing Doctrine Would Have a Devastating Impact on All the People of the State

From statehood in 1817 Mississippi has held its tidelands as a public trust for the common use of all the people. Since these lands could never be owned privately and legitimately, there would be no inequity against private owners who mistakenly believed that they owned them, but there would be a great impact on the rights of all the people in the State if Petitioners' claims are recognized as valid.

Throughout the years, beginning in 1857 with *Martin v. O'Brien,* 34 Miss. 21 (1857), whenever there has been any encroachment upon state-owned tidelands, the State has successfully asserted its sovereignty in the courts of the State. Petitioners' claim of ownership only became apparent when they granted oil and gas leases which included

state lands and came into conflict with oil and gas leases legally granted by the State Mineral Lease Commission.

The State did not wait 150 years to assert its title and is not trying to apply such title retroactively. Petitioners must be aware that their titles are based merely on donation grants affirmed by Acts of Congress in 1822 and 1830, which could convey no tidelands, and that their claims that their titles "stem from Spanish land grants" are fictitious. [Page 13 of Petitioners' brief]

In closing, Petitioners cite *Goodtitle v. Kibbe,* 50 U.S. (9 How.) 471, 478 (1850) and quote a few disconnected words, apparently to convey the impression that it would require a "very strong case indeed" for this Court to invalidate their patents to the tidelands in controversy. The situation in *Goodtitle v. Kibbe* was just the same as the case at bar.

There this Court had been asked to reverse *Pollard v. Hagan* in a case involving the same Act of Congress of 1836 and an inchoate Spanish grant dated December 12, 1809. This Court reaffirmed the right of Alabama to all lands below the ordinary high water mark of the tide and, in refusing to reverse *Pollard,* stated:

> "And it must be a very strong case indeed, and one where mistake and error had been evidently committed, to justify this court, after the lapse of five years, in reversing its own decision; thereby destroying rights of property which may have been purchased and paid for in the meantime, upon the faith and confidence reposed in the judgment of this court. But upon a review of the case, we see no reason for doubting its correctness, and are entirely satisfied with the judgment then pronounced." 50 U.S. at 477, 478.

We suggest that since 170 years have elapsed since Mississippi was vested with absolute ownership of all its tidelands, the case for reversal of its title must be more than "very strong." Petitioners have not made such a case.

CONCLUSION

For the foregoing reasons, the judgment of the Mississippi Supreme Court should be affirmed.

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